

STATE OF MICHIGAN
COURT OF APPEALS

DENISE ASHTON,

Plaintiff-Appellant,

v

ST. JOSEPH MERCY HOSPITAL, RICHARD
POMERANTZ, M.D., and HURON VALLEY
SURGERY ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED
February 17, 2004

No. 242917
Washtenaw Circuit Court
LC No. 99-004993-NM

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

Zahra, P.J. (*dissenting*).

I respectfully dissent. I disagree with the majority's conclusion that trial court erred in precluding plaintiff's expert, Dr. Semel, from "'offering opinions regarding gynecological issues,' including the removal of plaintiff's reproductive organs." Rather, I conclude that the trial court properly precluded plaintiff from establishing through expert testimony that Dr. O'Leary, the obstetrician-gynecologist who removed plaintiff's reproductive organs, would not have removed plaintiff's reproductive organs given knowledge of plaintiff's diverticulitis. Therefore, I would affirm the trial court's decision.

Plaintiff claims that defendant Pomerantz' failure to diagnose plaintiff's diverticulitis resulted in the loss of her left fallopian tube and ovary.¹ However, Dr. O'Leary, not defendant Pomerantz, removed plaintiff's reproductive organs. Doctor O'Leary is not a party to this lawsuit. Accordingly, plaintiff must establish that, "but for the lack of knowledge of [diverticulitis] on the part of [Dr. O'Leary], her claimed injuries would not have occurred. *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW2d 721 (2002) citing *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Otherwise stated, plaintiff must establish that, had

¹ Plaintiff concedes that her right fallopian tube and ovary were too infected to be salvaged.

defendant Pomerantz properly diagnosed plaintiff, Dr. O'Leary would not have removed plaintiff's left fallopian tube and ovary.

Plaintiff offers Dr. Semel, a general surgeon, to establish not only that Dr. Pomerantz, a general surgeon, misdiagnosed plaintiff, but also to testify that plaintiff's left fallopian tube and ovary could have been salvaged at the time Dr. O'Leary, a specialist in obstetrics and gynecology, removed them. The trial court did not limit Dr. Semel from offering testimony relating to the accuracy of Dr. Pomerantz's diagnosis. The trial court merely precluded Dr. Semel from speculating about whether this alleged misdiagnosis caused Dr. O'Leary, a non party to this case, to remove plaintiff's reproductive organs. The trial court did not abuse its discretion in rendering this ruling. Simply put, it is reasonable to conclude that evidence relating to what Dr. O'Leary would have done had she been provided a different diagnosis can be established through the testimony of Dr. O'Leary, but not by a putative expert who is hired by a litigant and whose medical expertise differs from that of Dr. O'Leary.

The wisdom of the trial court's ruling was revealed during the trial, which was interrupted, improvidently in my opinion, when this Court stayed the proceedings and granted plaintiff's application for leave to appeal. Prior to issuance of the stay, Dr. O'Leary testified that she would have removed plaintiff's left fallopian tube and ovary regardless of knowledge that plaintiff had diverticulitis. This testimony establishes that Dr. Pomerantz's alleged misdiagnosis was not the cause in fact of plaintiff's loss of her reproductive organs.

Expert testimony that is purely speculative should be excluded or stricken pursuant to MRE 403. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). Here, evidence that Dr. O'Leary, a non-party to this action, would have acted in accord with Dr. Semel's notion² of the standard of care for an obstetrician-gynecologist is purely speculative. The record reflects that it is reasonable to conclude that only Dr. O'Leary can establish what she would have done had plaintiff been diagnosed differently. The trial court properly excluded this aspect of Dr. Semel's testimony.

/s/ Brian K. Zahra

² Dr. Semel is not an obstetrician-gynecologist, and his testimony in regard to the standard of care for an obstetrician-gynecologist, if otherwise relevant, would be subject to meaningful cross-examination.